IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

FRIDAY, THE 7TH SEPTEMBER 2007 / 16TH BHADRA 1929

CRP.No. 772 of 2005()

AS.213/1996 of DISTRICT COURT, ALAPPUZHA
OS.88/1988 of ADDL.SUB COURT, ALAPPUZHA

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REVN. PETITIONER:

G.VIJAYAN PILLAI,
KETTIDATHIL HOUSE, WEST KALLADA VILLAGE,
PATHANAPURAM TALUK.

BY ADV. SRI.R.PARAMESWARAN NAIR

RESPONDENTS:

JOSEPH DEVASSIA,
THEKKETHUNDIYIL, VADAKKU VELIYANADU,
KUNNUMMA VILLAGE, KUTTANADU TALUK.

(DIED, LRS' IMPLEADED)

2. T.D. VARGHESE,
ALUMOOTTIL HOUSE,
PALLIKKACHIRA P.O.
PAYIPPADU
CHANGANACHERRY.

3. GRIGORY T.D.
THEKKETHUNDIYIL VEEDU,
VADAKKAN VELIYANADU
CHANGANACHERRY.

4. JOSEPH T.D.
THEKKETHUNDIYIL VEEDU,

KUNNENKERI P.O.
PERUNNA VIA
CHANGANACHERRY.

5. CELINAMMA JOSEPH,
PALAMPARAMBIL VEEDU,
KANJAR P.O. THODUPUZHA.

(RESPONDENTS 2 TO 5 ARE IMPLEADED AS PER ORDER IN IA 20/2007 DATED 9.1.2007)

BY SRI.JOMY GEORGE

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON 07/09/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDER ON I.A.NO.2215/2005 IN CRP 772/2005

DISMISSED

7.9.2007 SD/- PIUS C.KURIAKOSE, JUDGE.

/TRUE COPY/

P.A. TO JUDGE.

PIUS.C.KURIAKOSE, J.

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C.R.P.No.772 OF 2005

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Dated this the 17th day of December, 2008

ORDER

The defendant in O.S.No.88/1988 on the file of Additional Sub Court, Alappuzha, suit for money, challenges in this Civil Revision Petition under Section 115 of the Code of Civil Procedure, the judgment and decree of the District Court, Alappuzha dismissing the appeal preferred by the petitioner and confirming the positive decree which was passed by the trial court in favour of the respondent plaintiff.

2. The case of the plaintiff respondent before the trial court was that the plaintiff was the owner of two H.P. motors, its accessories and other pumping equipment; that the defendant was a pumping contractor of Apothikari padasekharam in Ambalappuzha village. During the second crop cultivation in 1987 for the purpose of pumping the

defendant took on rent the motors and accessories and pumping equipments on rent of Rs. 13,000/- after executing a coolicharth on 28/05/1987. The further case was that it was agreed by the defendant that he will pay a sum of Rs. 3,000/- as advance when the motor is taken delivery and installed at the motorthara and that it was further agreed that he would pay salaries of two drivers at Rs. 650/- per month for operating the motors. The plaintiff's allegation was that though the motor was taken delivery from the house of the plaintiff and fixed at motorthara, the defendant did not pay the salary of the drivers as agreed although their services were availed for pumping. The further allegation was that though the equipments were returned to the plaintiff after the cultivation was over, the defendant did not pay any amount towards the rent of the motors and accessories and that he has not paid salaries to the drivers as agreed. The claim therefore is for Rs. 13,000/- as rent and Rs. 650/- as salary.

3. The petitioner-defendant through his written statement admitted that he had taken on rent two H.P.motors belonging to the

plaintiff for second crop cultivation on rent of Rs. 13,000/- and had agreed to pay advance amount of Rs. 3,000/- and also to pay salary to drivers at the rate of Rs. 650/-. It was also admitted that he had executed an agreement regarding the same on 28/05/1987. But the contention raised is that towards the rent and towards the salary of drivers, he had paid Rs. 18,550/- on 16/11/1987 to the plaintiff's son Thankachan alias Gregory Thankachan, who was the driver of 50 H.P. motor and it is contended that the said fact is known to the padasekhara committee convenor Vijaya Pradeepan and the committee members Bhadran, Raghavan Pillai and the owner and driver of 20 H.P. Motor Sri. Moni. The payment it is contended was made in their presence and the petitioner had obtained a receipt from the plaintiff's son on the very same date. It is also contended that on the same date, petitioner has settled the account with owner and driver of 20 H.P.motor and also with one Raveendran who was the owner and driver of 30 H.P.motor which also had been hired by the defendant. It is further contended that the plaintiff had not raised any objection while taking back the delivery

of the motors and if there were any claims they would have raised the same before the Puncha Special Officer.

4. Learned Munsiff formulated issues as to whether

1) Suit is maintainable?

2) Whether the discharge is true?

3) Is statement of account correct?

5. The evidence of the case consisted of the oral testimony of PWs 1 to 3 and Ext.A1 Coolicharthu on the side of the respondent plaintiff. The same consisted of DWs 1 to 4 and Ext.B1 receipt on the side of the petitioner. Learned Munsiff on evaluation of the evidence on record decreed the suit and in appeal, the District Judge confirmed the decree.

6. I have heard the submissions of Sri.Parameswaran Nair, learned counsel for the revision petitioner and those of Sri. Jomy George, learned counsel for the respondennt Sri.Parameswaran Nair would argue that the defendant failed to establish that Ext.P1 document is with regard to the transaction between himself and the plaintiff is clearly erroneous. Ext.B1 had been proved and had actually

been relied on by the trial court in its judgment dated 17-1-1991. In the absence of any reliable evidence brought in subsequently the courts below were not justified in holding that Ext.B1 can be in respect of some other transaction. The scope of the remand order was not properly understood by the trial court. According to Sri.Parameswaran Nair the remand was for a limited purpose and the oral deposition of PW3 was the additional evidence adduced in the case after remand and the trial court having found that no importance can be given to the oral testimony of that witness. There was no justification for re-appraising the evidence and coming to an altogether different finding and decision than what was originally entered into in the first round. Learned counsel submitted that PW-2, the son of PW-1 was admittedly engaged by PW-1, his father to collect the amount from the defendant and therefore PW-2 was a competent agent of PW-1 for receiving money and for issuing receipts regarding the transaction. PW-3, according to Mr. Parameswaran Nair was an interested witness examined for the first time after the order of remand was passed by the court and his testimony should have been discarded in toto. The finding by the trial court for not producing receipt obtained from PW-3 whose motors were also hired by the defendant is against the law relating to burden

of proof under Section 118 of the Negotiable Instruments Act and against the principle that parties are governed by their pleadings. The other transactions of the defendant were not in issue in the case and therefore defendant could not be expected to produce evidence regarding the other transactions.

7. The submission of Mr.Parameswaran Nair were stoutly refuted by Mr.Jomy George. The scope of enquiry in a revision petition under section 115 is whether it can be said that the judgment of the lower appellate court which is final court on facts is vitiated by any jurisdictional error. Having scanned the judgment of the learned District Judge as well as the judgment of the trial court which was appealed against before the learned District Judge, it is not possible to say that the learned District Judge in exercise of appellate jurisdiction has acted illegally or with material irregularity. In short, I do not find any jurisdictional infirmity about the judgment of the lower appellate court warranting invocation of the revisional jurisdiction under section 115. On the persuasive submission of Mr.Parameswaran I had a quick glance through the evidence also and I find that the appreciation of the evidence on record by the lower appellate court was proper. The lower appellate court found that essentially the plea of the revision petitioner

was one of discharge and that the revision petitioner failed in substantiating that plea. As rightly noticed by the lower appellate court there is no mention in B1 regarding A1 or as to the ownership of the motor with the plaintiff. Admittedly the defendant had hired other motors also. The argument based on agency raised by Sri.Parameswaran Nair is not founded on the pleadings of the revision petitioner. The testimonies of PW-1 inspired confidence in the mind of the trial court as well as in the mind of the lower appellate court. This court will not be justified in upsetting the findings which are based on those testimonies.

CRP fails and the same stands dismissed.

(PIUS C.KURIAKOSE, JUDGE)

ksv/29208

PIUS C. KURIAKOSE, J.

W.P.(C)No. OF 200

Dated this the day of February, 2008

J U D G M E N T

THE

(PIUS C.KURIAKOSE, JUDGE)